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IN THE

Supreme Court of the United States

October Term, 1962

No. 1058

ERNESTINE GREENE,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Ernestine Greene, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse an order of the United States Court of Appeals for the Ninth Circuit affirming an order of the Immigration and Naturalization Service to deport her.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254 (1), U.S. Codes. The decision of the United States Court of Appeals was handed down January 17, 1963. This petition for certiorari is filed within 90 days and the time extended by Justice Douglas to May 1, 1963.

OPINION BELOW

The opinion below is reported in 313 F. (2), 148 and is attached to this petition for certiorari.

TREATIES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Treaty between the United States of America and Austria, signed at Vienna, June 19, 1928 and January 20, 1931; Treaty Series No. 838 and 839 Proclaimed by the President of the United States May 28, 1931:

". . . The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for *the defense of their rights,* and *in all degrees* of jurisdiction established by law . . . (Italics ours)

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 USCA § 1251 (2) (12):

(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who . . .

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title: . . .

Section 5(b) of Public Law 87-301:

. . . Any judicial proceeding to review an order of deportation which is pending unheard in any district court . . . on the effective date of this section . . . shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction . . .

§242.10 *Representation by counsel.* The respondent may be represented at the hearing by an attorney or other representative qualified under Part 292 of this chapter.

(c) *Use of prior statements.*[1] The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.

STATEMENT OF THE CASE

The petitioner is a young married woman, originally a native and citizen of Austria, who married an American soldier in Austria and came to the United States. She was lawfully admitted to the United States for permanent residence on June 28, 1952. Her name was originally Ernestine Maria Magdalena Pongracic. She married Mr. Drake, an American soldier, in Austria in 1951. That marriage was terminated by a divorce in 1953 in the State of Oklahoma, U.S.A. She does not have any children by this marriage. She went out of the United States on two occasions subsequent to her admission on June 28, 1952. The last entry by her, after a trip to Mexico, occurred in the year 1959. All the events with which she is charged occurred prior

[1]It will be noted that no provision is made for Counsel at the hearing of the "Special Inquiry Officer." Thereafter the statement taken by him becomes admissible evidence to deport. It smacks of totalitarianism.

to her last entry into the United States. She was married again to an American in 1960 and has been living in the United States ever since.

After her last entry into the United States she lost her identification card and applied to the Immigration Service for another card. As a result of this loss she appeared at the Immigration Service and an investigator took her sworn statement on two different occasions, to-wit: March 7, 1960 and April 6, 1960.

In these statements the investigator did *not* inform her of her right to have counsel at all stages of the proceedings, or at the investigating level. His statement solely was as follows:

> "Mrs. Drake, you are informed that I am an Investigator in the United States Immigration and Naturalization Service and as such am authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration, Nationality and Alien Registration laws of the United States. I desire to ask you some questions. You do not have to answer my questions. Any statement which you make should be voluntary and you are warned that anything you say here can be used by the Government as evidence in future civil or criminal proceedings against you or anyone else. Do you understand?"

Again on April 6, 1960 the investigator, William Barrow, took her statement with a stenographer present. Again, she was not advised that she had the right to an attorney, or be advised before she spoke.

These two statements, made when no attorney or even a friend was present to advise her, are the basis for her deportation. At no time was she warned that her statements might be the basis for deportation proceedings. On May 4, 1960 deportation proceedings took place before Hearing Officer Benjamin C. Myron. On May 10, a different hearing officer presided. He was Bert F. Kearney, Special Inquiry Officer, at Los Angeles, California, at which time she was represented by counsel and denied the various charges and deportability contained in the order to show cause. The decision of the hearing officer who ordered her deported was based on matters presented by the previous investigating officer in the statements taken from the petitioner before she was represented by counsel and without any advice that she had the right to be represented by counsel, and upon matters that would be deemed highly self-incriminating and objectionable and in violation of the Fifth Amendment to the Constitution of the United States, had she been represented by counsel at that stage of the proceedings.

Furthermore, all of the alleged acts took place prior to her last entry into the United States and could not be used to sustain the charge as stated in the order to show cause.

During the course of the secret inquiry by the original investigating officer he asked her regarding her sexual relationship with other men. Without benefit

of counsel and without being informed of her rights, she was asked if she had sexual relations with a man named Jim Watson. Upon asking the hearing officer whether she had to answer that, he asked her like a policeman giving the third degree if she refused to answer. She said "No." Later she stated that she had had sexual relations with Jim Watson once and he had given her no money for any such relationship. She was asked if she had ever worked as a call girl, which she denied. She was asked if she knew other girls who worked in various stores, and she said she did receive $10 from Jim Watson and she gave it back to him. She was asked if she was ever in Las Vegas. She said she was there a week or two but did not live there and did not work there as a prostitute.

A number of other questions were asked her about where she lived and how much rent she paid and whether she received any income by working as a "prostitute." She said that she was in the dressmaking business.

The investigating officer asked her leading questions, such as "But part of your source of income was from 'prostitution,' is that right?" Answer: "Partly, yes," all without the benefit of counsel. She stated that she had been convicted in the Beverly Hills Court on May 2, 1957 (which was prior to her last entry into the United States) and that she had not engaged in prostitution since that time. She said she had been going with one man, named Gene Greene, whom she

has married. He used to manufacture handbags and also different lines of women's clothes. At the time of this statement she had been going with Mr. Greene and intended to marry him. (She has since married him.)

In her second statement she testified that she designs as a free lance designer for clothes. She was asked by the investigating officer if she knew what the term "prostitute" means and he gave her a definition as "women who have sexual relations with men for money." She told the officer that sometimes people gave her $100, sometimes $50, as a gift.

Both of the statements which form the *sole* basis of the orders of deportation were taken and secured not only in the *absence of counsel*, but in the absence of *any advice to the petitioner that she was entitled to counsel*. During the pendency of the petition to review the deportation orders based upon the statements of the investigating officers, the case, which had been in the District Court of the United States, was transferred to the United States Court of Appeals for the Ninth Circuit pursuant to Section 5(a), now 8 USC Section 1105(a), of Title 8, and no hearing was held in the District Court.

QUESTIONS PRESENTED

1. Whether an alien is denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States when she is interviewed and her statement is taken by an Immigration officer for the purposes of a deportation proceeding without the alien being advised that she is entitled to be represented by an attorney and to be advised by an attorney before the hearing.

2. Whether an alien is entitled, by reason of the treaty of the United States with Austria, to the free access to all the courts in the defense of her rights and the protection and guarantees of the Fifth Amendment to the Constitution of the United States.

3. Whether an alien, who has been legally readmitted to the United States after having departed from the United States, can be deported by reason of occurrences prior to her last admission to the United States, or whether her legal readmission is *res judicata* of her right to remain.

4. Whether the evidence of a hearing officer, taken privately and without any friend or counsel being present and without any advice as to the rights to counsel and to a fair hearing, is substantial evidence and sufficient to be competent evidence upon which to base an order of deportation. (*Ronaldi v. Perfetto*, 235 U.S. 115; 2 L. Ed. 144; *Ng Fung Ho v. White*, 259 U.S. 276, 284; 66 L. Ed. 938).

5. Whether the court erred in denying the petitioner an opportunity to reopen the case and her matters.

6. Whether it was error for the special inquiry officer to accept the statement of the inquiry officer as evidence once the petitioner sought to repudiate it on the ground that she was confused at the time of making it and on the further ground that she had no clear understanding of the charges involved (she being then unrepresented by any counsel or any person who could or did explain it to her).

7. Whether Section 242(b) of the Immigration Act, which provides that determination of deportability should be made *only upon the record made in a proceeding before a special inquiry officer, inherently*, and as construed and applied, is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States in that it deprives a person of the right to be confronted by witnesses, to be represented by counsel, to subpoena and produce witnesses in a fair and public hearing and to have a full court hearing on all the matters involved.

8. Whether Section 242(b) of the Immigration Act denied this petitioner free right to the access of the District Court, guaranteed by the Treaty with Austria.

9. Whether petitioner was dealt with fairly procedurally and whether she was accorded a fair hearing guaranteed by the Fifth Amendment to the Consti-

tion of the United States when she was questioned alone by an officer, accused in totalitarian fashion of wrong-doing, and not advised that she had the right to an attorney, or that she did not have to answer accusing or incriminating questions.

Whether Section 242, 1(b) Immigration and Naturalization regulations, inherently and as construed and applied is unconstitutional and violative of due process of law guaranteed by the 14th Amendment U. S. Constitution.

Galvan v. Press, 347 U.S. 522, 529, 530; 98 L. Ed. 911, 921.

10. Whether the terms "prostitute", as contained in Subsection 12 of 8 USC, Section 1501, is so vague, indefinite and uncertain as to fail to constitute a basis for deportation.

11. Whether the word "prostitute" has been erroneously and improperly construed and applied in this case, in any event.

12. Whether an alien is entitled to all the rights in an administrative procedure and hearing as she would have in a habeas corpus hearing and whether those rights have to be determined in the District Court of the United States in order to accord the alien a fair hearing, and a hearing such as is guaranteed by the treaty with Austria.

13. Whether Section 1105(a) of Title 8 (75 Stats. Sec. 650) is unconstitutional and in violation of due process of law and the equal protection of the laws in that it transfers to the Circuit Court of Appeals a proceeding to review the deportation of an alien without giving the alien a chance to be heard in the District Court by an adversary proceeding which is there available and by the production of witnesses for and on behalf of the alien and by the opportunity to be confronted by witnesses against the alien and to examine and cross-examine them.

REASONS FOR GRANTING THE WRIT

This case presents important and new questions of immigration law regarding the rights of an alien to an attorney and to a fair hearing before deportation and also rights under a treaty. It also involves construction of the term "prostitute", undefined by the statute. It has been held that an alien is entitled to due process of law the same as a citizen. *Galvin v. Press*, 347 U.S. 522, 529, 530; 98 L. Ed. 921. This case also involves construction of the new procedure under the Administrative Procedure Act on appeal from the Administrative Procedure Act, and Immigration Act.

See: *Rusk v. Cort*, 369 U.S. 367, 7 L. Ed. 2d 809.

The right to due process necessarily encompasses the right to have an attorney at *all* stages of her proceedings, not merely after she is lured to give a statement privately to an immigration officer.

Douglas v. California, 9 L.ed. 2d 811
Gideon v. Wainwright, 9 L.ed. 2d 789

Mrs. Greene was obviously ignorant of such a right and the investigating officer did not inform her that she would have the right to be represented by counsel and to be confronted by witnesses against her and not be forced, in effect, to confess perhaps some sexual peccadillos between her marriages.

Deportation can be as serious, or even more serious, than being confined to jail or prison. It amounts to banishment.

Galvin v. Press 347 U.S. 522, 529, 530
Fong Haw Jan v. Phelan, 333 U.S. 6, 10; 92 L.ed 433, 436
Ng Fung Ho v. White, 259 U.S. 276, 284

To one who has married an American, it means departure from our shores and termination, perhaps, of a marital relationship. Before this occurs, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 94 L. Ed 616, 628, due process of law requires that the person be represented by counsel. The words are well expressed in *Gideon v. Wainwright*, 9 L.ed. 2d 789, 805, also *Powell v. Alabama*, 287 U.S. 45, 77 L.ed. 158, apply here:

"First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. *Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with.* That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that very soon after conviction able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity of counsel that appeared immediately or shortly after their conviction." 224 Ala. at pp. 554, 555, 141 So. 201.

"It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation

of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

"It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, 42 L.ed. 780, 790, 18 S.Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L.ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of

a judicial determination it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were

arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

"The decisions all point to that conclusion. In *Cooke v. United States*, 267 U.S. 517, 537, 69 L.ed 767, 774, 45 S.Ct. 390, it was held that where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain."

Any doubt in the interpretation of an immigration statute must be resolved in favor of the alien because of the drastic consequences of deportation.

Barber v. Gonzales, 347 U.S. 637, 642
Fong Haw Tanse. Phelan, 333 U.S. 6, 92 L.ed. 433
Holtzapfel v. Wyrsch, 259 F. 2d 890, 893
Saukow v. Immigration and Naturalization Service, 314 F. 2d 34, 37

Here we have a woman ignorant of her rights, confronted by an officer conducting an investigation in the form of cross-examination and leading questions to establish a deportability. No friend or person or lawyer was there to advise her or tell her what her rights were. The recent cases of this court, *Douglas v. California*, 9 L. Ed. 2d 811; and *Gideon v. Wainwright*, 9 L. Ed. 2d 789, holding that indigents may have an

attorney appointed for them, express rights which certainly should apply under our treaty arrangements with Austria that citizens of that country are to be treated with like dignity as the most favored nation and with like dignity to our own citizens and to have the same rights through the courts as our own citizens. Certainly, to proceed upon the statements of a hearing officer in the privacy of his offices smacks too much of prolatarian countries and is not the example which we hold out.

This court should therefore grant a hearing to decide that before an alien may be questioned and a statement taken for deportation that she will be entitled to the benefit of counsel at all stages of the proceedings from the very commencement. Like the *McNabb* case, where statements are taken without such benefit or right of counsel being granted and prior to arraignment in the criminal case, the statements of an accused cannot be used.

A hearing should also be granted to determine if our treaty arrangements with Austria give to Austrian subjects the same rights and privileges through our courts as our own citizens in our courts.

In all other declaratory relief actions, the persons coming into court have a right to appear in the District Court to subpoena witnesses and to have a trial in the real sense of the word. In this case, the defendant was denied such a trial; had no opportunity to be

heard in the District Court or to produce witnesses or to challenge the procedure in a court where the right of subpoena, of process of examination and cross-examination and the other basic rights of a trial are preserved.

Another reason why this court should grant a hearing is that the statute involved does not define the word "prostitution." This word has varying meanings in varying states. The case quoted by the Circuit Court was a Mann Act case involving a sect practicing polygamy. The definition quoted as to prostitution was a definition from the *Oxford English* Dictionary. Different states have different definitions, but the important point is that the Immigration statute itself fails to define the word. A statute which is so vague, indefinite and uncertain should not form the basis for a deportation order. Aliens who may face deportation have as much right to know what the law means as Americans charged with crime.

Nor is the word construed here even with its English meaning as given by the Circuit Court. As stated in the opinion, the alleged admissions of the petitioner were gifts by men who had appreciated, perhaps, her personal favors in the light of her charming personality. That all of this occurred with a normal woman, in between marriages, has been the occasion of consideration by District judges, one of whom stated that if the applicant for citizenship frankly told the court

of such conduct he would believe she was honest and worthy of admission, whereas if she denied it, he would know she was lying and unworthy of admission.

Since this court has not defined or determined the meaning of the word or how it should be construed and applied in immigration cases (on account of its uncertainty), a hearing should be granted by this court.

The court is also called upon to determine whether any of these acts, if true, would be sufficient for deportation in the light of the fact that all of them occurred *prior* to her last entry into the United States. Having determined at her last entry that she could properly be admitted, the determination was *res judicata* and final.

Another reason for the granting of the writ is that there has been no compliance, in fact, with the provisions of Section 242(b) of the Immigration and Naturalization Act, which requires that before there can be deportation, the evidence supporting such deportation must be *reasonable*, *substantial* and *probative*. We submit that there was no evidence submitted except the statement of a hearing officer, taken privately, almost in camera, as it might be taken in a totalitarian country, and that this is the basis for the deportation. Such a statement is not reasonable, substantial and probative evidence, as required by law. (Sec. 242.14. Immigration and Naturalization Section Title 8, C.

& R.) In a criminal case it would be excluded as having been obtained in violation of due process of law. No less should be the case here.

Substantial evidence is not met by evidence which gives equal support to inconsistent inferences.

NLRB v. Shen. Valley Meat Packers, Inc., 211 F. 2d 289, 293;

Zito v. Moital, 174 F. Supp. 531;

Sawkow v. Immigration and Naturalization Service, 314 F. 2d 34, at 38.

It is further submitted that Congress, in providing that an order of the Immigration and Naturalization Service might be heard upon declaratory relief but that the only appeal for review would be in the Court of Appeals, is unconstitutional and unfair in that it deprives the petitioner, and other persons similarly situated, of a full hearing in the District Court where the processes of the Court on a declaratory relief trial enable the bringing of witnesses into court and the presentation of evidence similar to a *habeas corpus* proceeding in the event the petitioner had been placed in custody. Such a novel procedure to provide only for review in the Circuit Court deprived the petitioner of her day in court and of the rights that she would have in a declaratory relief trial in the District Court where

she would be treated with rights accorded American citizens—have the right to produce witnesses and present evidence and be heard in accordance with usual trial procedure.

Section 1105a, as now amended, deprived petitioner of her day in court and only gave her an *appellate review* of an administrative agency. This is contrary to the treaty with Austria, to allow their citizens full access to the courts the same as ours, and is violative of due process.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and review and reverse the orders of the court below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ERNESTINE GREENE,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,

Respondent.

No. 17,664

Jan. 17 1963

Upon Petition to Review an order of the Immigration & Naturalization Service.

Before: MERRILL and DUNIWAY, Circuit Judges, and TAVARES, District Judge.

TAVARES, District Judge.

On March 21, 1961, petitioner Ernestine Greene filed a complaint in the United States District Court for the Southern District of California for a judgment declaring that petitioner was not deportable from the United States. The complaint was originally filed pursuant to Section 10 of the Federal Administrative Procedure Act, 5 U.S.C. 1009, which provided for review of deportation orders by an action for declaratory relief under the Declaratory Judgment Act, 22

U.S.C. §2201. After respondent George K. Rosenberg, as District Director, Immigration and Naturalization Service, Los Angeles, California, had filed an answer, and while the cause was awaiting pre-trial, Public Law 87-301 (approved Sept. 26, 1961 and effective October 26, 1961) became effective (75 Stat. 650). Section 5(a) of that law, now 8 U.S.C. §1105(a), provided that judicial review of deportation orders was thenceforth to be by petition to the courts of appeals. As required by Section 5(b) Public Law 87-301 (quoted in 8 U.S.C.A. 1961 Ann. Cum. Pocket Parts, in Note to §1105(a)) this pending case was transferred from the District Court to this court.[1]

Petitioner, a native and citizen of Austria, was lawfully admitted to the United States for permanent residence on June 28, 1952, and has resided continuously in the United States since that time. She made two short visits to Mexico, one in 1956, and the other about 1958 or 1959, being readmitted each time as a returning resident alien.

In April, 1960, she was served with an Order to Show Cause and Notice of Hearing issued by the Immigration and Naturalization Service (hereinafter

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[1]Section 5(b) of Public Law 87-301 supra reads in part as follows:

"... Any judicial proceeding to review an order of deportation which is pending unheard in any district court ... on the effective date of this section ... shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction ..."

sometimes called the "Service") requiring her to appear for hearing and show cause why she should not be deported from the United States as an alleged alien who had engaged in prostitution.

A hearing before a Special Inquiry Officer was duly held, at which evidence was presented in support of the charge, and ample opportunity was afforded to petitioner, who was represented by counsel, to present any defense she might desire to offer. At the hearing petitioner testified orally, both on direct examination and on cross-examination by her counsel. Two previous sworn statements of petitioner made to and at the request of Investigator Barrow, on March 7 and April 6, 1960, respectively, were identified by petitioner and admitted in evidence.

The applicable statutory provisions are:

8 U.S.C.A. §1251 (a) (12) reading in part:

"(a) Any alien in the United States (...) shall, upon the order of the Attorney General, be deported who—

"(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182 (a) (...) of this title (...)."

8 U.S.C. §1182 (a) (12) provides:

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • • •

"(12) Aliens who are prostitutes or who have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution. • • •"

From an adverse ruling of the Special Inquiry Officer based on this first hearing petitioner duly appealed to the administratively created[4] Board of Immigration Appeals, Washington, D. C., which, after the case had been duly briefed and orally argued, rendered a decision sustaining the Inquiry Officer's findings of fact and conclusions of law.

Thereafter petitioner moved the Board of Immigration Appeals to reopen the hearing in her case for the purpose of allowing her to introduce alleged new evidence. Accompanying this motion was petitioner's affidavit in which she swore, among other things, that she had been upset when her statements had been taken by Investigator Barrow, that she had not understood the meaning of the term "prostitution," and that the sexual relations which she had had with different men had been "affairs" which did not constitute prostitution.

Thereafter, the Board of Immigration Appeals issued a decision denying petitioner's motion, whereupon this action for review was filed.

The grounds for relief claimed by petitioner are:

1. That the order of deportation is not based upon "reasonable, substantial and probative evidence."

2. That the Board of Immigration Appeals erred in denying petitioner's motion to reopen.

[4] C.F.R. (1961 Cum. Pocket Supp.) §3.1 et seq.

Ground 1, the claim that the order of deportation was not based upon "reasonable, substantial and probative evidence." The two written sworn statements of petitioner, given to Investigator Barrow bear internal evidence that she understood spoken English quite well and understood the meaning of the term "prostitution."

After she had given these two sworn statements, petitioner was granted a continuance of the hearing on May 4, to May 10 to enable her then retain an attorney to be present. On May 10, with representation by her own counsel, the above-mentioned hearing before the Special Inquiry Officer was held. During the hearing, her attorney was given a 10-minute recess during which to examine both such sworn statements, after petitioner had identified the same, together with a number of handwritten corrections thereto, as having been made by her.

After petitioner's attorney had examined these two statements, and after they were offered in evidence, the following transpired:

By Counsel:

"I would like to . . . I can't object to the introduction into the evidence, I realize that, not on the regular grounds, but I would like to state for the record that I have discussed that with my client, the 2 exhibits that are now in, and she has stated to me that at the time they were made that she was

noticeably upset and noticeably confused and that there was a confusion in her mind as to the basic meaning or the legal meaning of prostitution. I would like that on record because I have covered that with her."

By Inquiry Officer to Counsel:

"Of course, you have the right to question her regarding anything in the statements."

By Counsel: "I will, sir, thank you."

(P. 10 of Tr. of Hearing 5/10/60).

However, petitioner did not testify in any attempt to further explain her previous testimony or actions. At this hearing a record of conviction in Beverly Hills Municipal Court, identified by petitioner as correct, and referring to her, was received in evidence. On cross-examination she explained the Beverly Hills conviction, saying the man whom a friend of hers had asked her to entertain, had disrobed, and she had done so and put on a negligee and then was arrested by the man who turned out to be a police officer, and that she had had no sexual relations with him, and received no money from him. (Tr. 14-15).

For purposes of this opinion, we assume, without deciding, that the record of conviction was insufficient to establish that the offense of which she was convicted was prostitution. There nevertheless was ample evi-

dence from which the Special Inquiry Officer who passed upon her case at the first hearing could reasonably have found that she had engaged in prostitution.

Petitioner argues (a) that the order of deportation must be "based upon reasonable, substantial and probative evidence" (8 U.S.C.A. §1252(b)) to support the basic finding, as cause for deportation, that she had been "engaged in prostitution"; and (b) that the term "engaged in prostitution" as used in the statute[1] requires proof that appellant engaged in the "offering of the body to indiscriminate lewdness for hire."[2] We, of course, agree with these premises, but not with the conclusion of alleged insufficiency of the evidence to satisfy these requirements.

Offering of rendering available the use of the body to seven different men, not her husband, in succession over a period of 18 months, on an average of 1 to 3 times per week, by her own admission, for which petitioner received rewards in money or other things of value averaging from $50 to $100 per incident, constituting the major part of her income during that period, is, we feel, sufficiently indiscriminate and suffi-

[1] Quoted in Note 2, ante.

[2] Citing CLEVELAND v. U.S., 1946, 329 U.S. 14, which quoted 8 Oxford Eng. Dict. 1197 defining prostitution. Petitioner's brief, however, quotes from only a portion of that definition.

The Cleveland case, by way of dictum, says:

"Prostitution, to be sure, generally suggests sexual relations for hire." (emphasis added)

Cole, 3 (329 U.S. 17, cited to this statement, makes the following quotation: "of women. The offering of the body to indiscriminate lewdness for hire, esp. as a practice or institution; whoredom; harlotry." 8 Oxford English Dictionary 1497."

ciently for hire, even if accompanied by her claimed liking for each person and her expectation of sexual satisfaction, to form a reasonable basis for a finding by the Service that she was engaging in prostitution, especially in the light of her total testimon. Further, even if we might draw a contrary conclusion from the same evidence, we cannot say that the Special Officer was unreasonable in drawing the conclusion that he did."

Ground No. 2. Did the Board err in denying the Motion to Reopen? As pointed out in the government's brief, the Board is not a statutory body, but is wholly a creature of regulations issued by the Attorney General. 8 C.F.R. (1961 Cum. Pock. Supp.) §3.1 et seq. And there is no statute requiring the Board to reopen a deportation hearing or otherwise fixing the conditions upon which a hearing will be reopened. The matter of rehearings appears to be governed by the regulations which provide:

> "The Board may on its own motion reopen or reconsider any case on which it has rendered a decision. Reconsideration or reopening of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the service, or by the party affected by the decision, shall be only upon written Motion to the Board . . ." 8 C.F.R. (1961 Cum Pock. Supp.) §3.2.

"See Lundgren v. Freeman (9 Cir. June 27, 1962) No. 17,232, opinion by Duniway, Circuit Judge.

In view of our decision we need not decide here whether the discretionary power to reopen which seems to be granted to the Board is reviewable on an appeal such as this. We assume for purposes of argument, that a ruling denying a motion to the Board for hearing is reviewable for abuse of discretion.

In our view the Motion and affidavit in support of the Motion present no newly discovered evidence. Nor would the substance of that affidavit, even if accepted as true in its entirety and admitted in evidence, offer any new ground for reversal of the Board's ruling on the merits.

In the light of the evidence in the record, the alleged facts proposed to be presented by the affidavit would sustain, not contradict, the conclusions of the Board.

The fact that appellant, before the Motion, married a United States citizen is of course not a ground upon which this court can reverse the Board's decision denying the Motion.

The appeal is dismissed.

(Endorsed) Opinion Filed Jan. 17, 1963.

Frank H. Schmid, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1058

ERNESTINE GREENE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 313 F. 2d 148.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1963. The time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including May 1, 1963, and the petition was filed on April 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a statute, transferring from the district court to the court of appeals jurisdiction to review pending deportation orders, deprived petitioner, an Austrian alien, of access to the district court in violation of a treaty between the United States and Austria or the due process clause.

2. Whether petitioner was denied due process in that she was not advised that she could be represented by an attorney before giving an Immigration Service investigator sworn statements which were later introduced in evidence at her deportation hearing.

3. Whether the statute, which provides for the deportation of "[a]liens who are prostitutes or who have engaged in prostitution" is unconstitutionally vague because it does not define "prostitution."

4. Whether acts of prostitution, committed by petitioner subsequent to her original entry into the United States but prior to a later re-entry, constituted a valid basis for deportation.

5. Whether the order for petitioner's deportation was supported by reasonable, substantial, and probative evidence.

6. Whether the Board of Immigration Appeals properly denied petitioner's motion to reopen the deportation proceedings on the basis of alleged newly discovered evidence.

STATEMENT

1. On March 21, 1961, petitioner filed a complaint in the United States District Court for the Southern District of California pursuant to 28 U.S.C. 2201 and

5 U.S.C. 1009 for a declaratory judgment attacking an order which declared her deportable as an alien who, after entry, had engaged in prostitution. After answer but before trial, Public Law 87-301, 75 Stat. 650, Appendix, *infra*, p. 13, became effective on October 26, 1961. Section 5(a) of that Act provided that judicial review of deportation orders thereafter was to be by petition to the court of appeals, and Section 5(b) provided for the transfer of pending proceedings for review of deportation orders to the court of appeals. On November 3, 1961, petitioner's pending proceedings were transferred to the court of appeals (Vol. I).[1] On January 17, 1963, the court of appeals upheld the deportation order and ordered the appeal dismissed (Pet. App. 1-9).

At the deportation hearing, petitioner admitted that on March 7, 1960, and on April 6, 1960, she had signed sworn statements concerning her immigration status and had made handwritten changes indicated by her initials (Tr. 8-9). A ten-minute recess was declared so that petitioner's counsel could review these statements. When the examining officer then offered the two statements in evidence the following colloquy occurred (Tr. 10):

> By Counsel: I would like to—I can't object to the introduction into the evidence, I realize

[1] The record is in two volumes. Volume I contains the proceedings in the court of appeals; Volume II contains the administrative proceedings conducted by the Immigration and Naturalization Service. The transcript of the deportation hearing, which is included in Volume II, will be referred to as "Tr."

that, not on the regular grounds, but I would like to state for the record that I have discussed that with my client, the two exhibits that are now in, and she has stated to me that at the time they were made that she was noticeably upset and noticeably confused and that there was a confusion in her mind as to the basic meaning or the legal meaning of prostit..tion. I would like that on record because I have covered that with her.

BY INQUIRY OFFICER TO COUNSEL: Of course you have the right to question her regarding anything in the statements.

BY COUNSEL. I will, sir, thank you.

BY INQUIRY OFFICER: The statements will be received in evidence and marked as one exhibit—

EXHIBIT NO. 2.

The statement of March 7, 1960, recites (p. 1):

INVESTIGATOR to respondent: Q. Mrs. Drake [petitioner], you are informed that I am an investigator in the United States Immigration and Naturalization Service and as such am authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration, Nationality and Alien Registration laws of the United States. I desire to ask you some questions. You do not have to answer my questions. Any statement which you make should be voluntary and you are warned that anything you say here can be used by the Government as evidence in future civil or criminal proceedings against you or anyone else. Do you understand?

A. Yes.

Q. With that understanding are you willing to answer my questions?

A. Yes.

The investigator gave petitioner a similar warning as to her rights prior to her statement of April 6, 1960 (p. 1).

Petitioner said in the statement of March 7, 1960, that she was born in Vienna on February 6, 1927, and is a citizen of Austria; that she entered the United States at New York on June 28, 1952, and has since resided in the United States; that she visited Mexico once in 1956 and once in 1958 or 1959 and reentered the United States on both occasions (pp. 2–4). When the investigator asked petitioner if she knew what the term "prostitute" means, she replied, "Well, yes, if you go out with somebody and they give you some money". The investigator replied that a "prostitute" is "defined as women who have sexual relations with men for money" (p. 7). Petitioner stated that she practiced prostitution in 1956 and 1957 and that she received from $50 to $100 for her acts (p. 7). She had sexual intercourse with "customers" over an approximately eighteen-month period, "sometimes twice a week, sometimes three times a week, sometimes once a week." She stated that, since her income from other employment was "not enough to pay the rent," she started prostitution (p. 9). In the statement of April 6, 1960, petitioner said that she understood that "according to the law a prostitute is a woman who has sexual relations with men for payment of a fee in money" (p. 6).

The Service also introduced at the deportation hearing Exhibit 3, which showed petitioner's conviction on May 3, 1957, on a plea of guilty to a violation of

a Los Angeles County ordinance by unlawfully visiting a house in Los Angeles County for the purpose of having sexual intercourse with a person to whom she was not married. As to this incident, petitioner testified at the deportation hearing that a man known by one of her friends came to her home and became friendly. When she changed to a negligee, the man showed a badge and said that he was a policeman. Petitioner stated that she did not have sexual relations and did not receive any money from him (Tr. 13–15).

The Special Inquiry Officer found that the charge contained in the order to show cause was sustained by reasonable, substantial, and probative evidence and ordered that petitioner be deported. The Board of Immigration Appeals upheld the ruling by the Special Inquiry Officer. On March 9, 1961, the Board of Immigration Appeals denied petitioner's motion to reopen the proceedings to hear allegedly newly discovered evidence that she did not understand the meaning of the term "prostitution," but merely had "affairs" with seven different men, some of whom gave her money or helped to pay her rent (Vol. II,

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 21–22) that Public Law 87–301, 75 Stat. 650 (Appendix, *infra*, p. 13), cut off her right to a full hearing in the district court in violation of the treaty between the United States and Austria guaranteeing "access to the courts of justice * * * in all degrees

of jurisdiction established by law" (see Pet. 2). Congress had power, within the limitations of due process, to confer jurisdiction for the review of deportation orders upon whatever lower federal courts it chose. Petitioner was not deprived of access to the courts of the United States; instead, the statute merely made the court of appeals rather than the district court the initial reviewing tribunal under the applicable American law.

Furthermore, contrary to petitioner's suggestion, the new procedure did not violate due process by depriving her of a plenary trial available only in a district court. The new statute simply substituted the courts of appeals for the district courts. Consequently the issue in the court of appeals was the same as it would have been in the district court—whether, as Section 242 of the Act (Appendix, *infra*, p. 15) requires, the administrative record adequately supported the order of deportation. This Court has repeatedly upheld Congress' power to give the executive branch the power to determine deportability without providing for plenary judicial review. *E.g., Zakonaite* v. *Wolf*, 226 U.S. 272; *United States ex. rel. Turner* v. *Williams*, 194 U.S. 279.

2. Petitioner's sworn statements were taken by an investigator pursuant to authority granted under Section 235 of the Immigration and Nationality Act (Appendix, *infra*, p. 14) to inquire into her right as an alien to reside in the United States. She was advised on each occasion that she did not have to make a statement, and that any statement made could

be used against her in any future civil or criminal proceedings. No claim is made that any coercion was used. At the hearing at which petitioner's deportability was established, petitioner was represented by counsel who expressly stated that she did not object to the admissibility of the statements. She merely contended that petitioner was confused at the time the statements were made.

Petitioner argues (Pet. 13–18) that her statements should not have been admitted at the deportation hearing because she was not affirmatively advised of her right to confer with counsel before the statements were made to the investigator. However, petitioner cannot raise this objection when she failed to object at the hearing to the admission of the statements. Furthermore, even where persons are interrogated by police as to commission of a crime the statements are not deemed involuntary or inadmissible because an accused has not been told of his right to counsel. Cf. *Wilson* v. *United States*, 162 U.S. 613, 623–624; *Morton* v. *United States*, 147 F. 2d 28, 31 (C.A. D.C.), certiorari denied, 324 U.S. 875; *United States* v. *Sinciro*, 193 F. 2d 136, 137 (C.A. 3), certiorari denied, 343 U.S. 904. It follows, *a fortiori*, that an investigator of the Immigration and Naturalization Service is not required to advise a person suspected of being illegally in the United States of the right to counsel since deportation is a civil matter. While petitioner claims that she was confused, her statements show on their face that she clearly understood the questions addressed to her, including the meaning of the term "prostitution."

3. Sections 212 and 241 of the Immigration and Nationality Act provide for the deportation of "[a]liens who are prostitutes or who have engaged in prostitution" "at any time after entry." The statute was not unconstitutionally vague in failing to define "prostitution" (see Pet. 19–20). The term is a common one with a well understood meaning. The statute thus conveys sufficiently "definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *De George*, 341 U.S. 223, 231–232; see *United States* v. *Spector*, 343 U.S. 169.[2]

4. Petitioner argues (Pet. 20) that she could not be deported under Sections 212 and 241 of the Act since the acts of prostitution occurred subsequent to her original entry into the United States and prior to a later reentry. She reasons that the allowance of her subsequent entry was a final determination as to her proper admission and was therefore *res judicata*.

This argument is plainly erroneous. As indicated by this Court's opinion in *Bonetti* v. *Rogers*, 356 U.S. 691, 697, the significant entry for the purpose of deportation for acts after entry is that under which the alien "claims the status and right of lawful presence that is sought to be annulled by his deportation."

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[2] In addition, even assuming the statute was unclear, Congress may enact grounds of deportation retroactively because the *ex post facto* clause of the Constitution does not apply. *E.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580. Thus, an alien is not constitutionally entitled to advance warning as to grounds of deportation and therefore the statute need not be clear on its face. See the government's brief in *Rosenberg* v. *Fleuti*, No. 248, this Term, pp. 33–35.

Petitioner was admitted for permanent residence in 1952. Accordingly, petitioner's acts of prostitution in 1956 and 1957, subsequent to the 1952 "entry," constituted conduct "after entry" which was basis for deportation under the Act. See *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *United States* v. *Kenton*, 224 F. 2d 803, 805–806 (C.A. 2). Furthermore, if petitioner's latest entry rather than her entry in 1952 were the crucial one, petitioner was excludable at the time of her latest entry under Section 212 of the Act since she had previously engaged in prostitution and therefore is deportable under Section 241 as a person who at the time of entry was excludable. Petitioner's admission by administrative officers obviously was not a judicial determination of valid entry which could be binding as *res judicata*.

5. Contrary to petitioner's contention (Pet. 20-21) there was reasonable, substantial, and probative evidence to support the deportation order, as required by Section 242(b) of the Act (Appendix, *infra*, p. 15). Petitioner's two sworn statements to the investigator (Exhibit 2) admitting that she engaged in prostitution were alone sufficient to support the deportation order. *Leffer* v. *Nagle*, 22 F. 2d 800, 801 (C.A. 9). Moreover, her Los Angeles conviction of a crime closely related to prostitution tended to corroborate her admissions.

6. The Board of Immigration Appeals did not err in denying petitioner's motion to reopen the deportation proceedings on the ground that she desired to offer new evidence that she did not understand the

meaning of the word prostitution, but merely had affairs with seven different men. The federal courts have uniformly held that the Board's determination whether to permit reopening to reconsider a determination of deportability may be overturned only if the alien demonstrates a clear abuse of discretion. *E. g., Rystad* v. *Boyd*, 246 F. 2d 246, 249 (C.A. 9), certiorari denied, 355 U.S. 912; *Deatico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C.A. 2); see Gordon and Rosenfield, *Immigration Law and Procedure* (1959), pp. 51, 585–586.

Here, the Board plainly did not abuse its discretion. The evidence as to whether petitioner understood the meaning of prostitution was within her own knowledge and control; indeed the evidence she proposes to introduce is her own testimony concerning her state of mind. The Special Inquiry Officer stated at the deportation hearing that petitioner's counsel could question her as to this subject (Tr. 10) but she did not choose to do so. Thus, petitioner had ample opportunity to present evidence at the original hearing. Accordingly, the court below was correct in its ruling that petitioner's motion and affidavit did not present newly discovered evidence. Even if it did, petitioner's claim that she was confused at the time she made the statements is refuted, as noted above, by the statements themselves. Her own proffered testimony that she was confused would not in these cir-

---

[1] The allegation in the affidavit that petitioner is now married to a United States citizen, although the statement of a new fact, is immaterial on the question as to her deportability.

cumstances warrant the reopening of the deportation proceedings.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1963.

APPENDIX

Public Law 87-301, 75 Stat. 650, enacted on September 26, 1961, provides in pertinent part:

> "SEC. 5. (a) Title I of the Immigration and Nationality Act (8 U.S.C. 1101) is hereby amended by adding the following:
>
> JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION
>
> SEC. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Title or comparable provisions of any prior Act * * *.
>
> (b) This section shall take effect on the thirtieth day after its approval and, notwithstanding the provisions of any other law, including section 405 of the Immigration and Nationality Act, shall then be applicable to all administrative proceedings involving deportation or exclusion of aliens notwithstanding (1) that the person involved entered the United States prior to the effective date of this section or of the Immigration and Nationality Act or (2) the administrative proceeding was commenced or conducted prior to the effective date of this section or of the Immigration and Nationality Act. Any judicial proceeding to review an order of deportation which is pending unheard in any district court of the United States on the effective date of this section * * *.

shall be transferred for determination in accordance with this section to the court of appeals having jurisdiction to entertain a petition for review under this section. * * *

Section 212 of the Immigration and Nationality Act, 8 U.S.C. 1182, provides in pertinent part:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(12) Aliens who are prostitutes or who have engaged in prostitution, or aliens coming to the United States solely, principally, or incidentally to engage in prostitution * * *.

Section 235 of the Immigration and Nationality Act, 8 U.S.C. 1225, provides in pertinent part:

(a) * * * The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. * * *

Section 241 of the Immigration and Nationality Act, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212(a) * * *.

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, provides in pertinent part:

* * * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. * * * Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. * * *

* * * * *

8 C.F.R. 3.2 provides in pertinent part:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a

decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing * * *.

* * * * * *

8 C.F.R. 3.8 provides in pertinent part:

Motion to reopen or motion to reconsider.

(a) *Form.* * * * Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

* * * * * *

8 C.F.R. 242.10 provides:

Representation by counsel.—The respondent may be represented at the hearing by an attorney or other representatives qualified under Part 292 of this chapter.

* * * * * *

8 C.F.R. 242.14 provides in pertinent part:

Evidence—(a) *Sufficiency.*—A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * * * * *

(c) *Use of prior statements.*—The special inquiry officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1983

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1058

ERNESTINE GREENE,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,
Respondent.

PETITION FOR REHEARING

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ERNESTINE GREENE,
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vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,
Respondent.

PETITION FOR REHEARING

Your petitioner, Ernestine Greene, respectfully petitions for rehearing in the above-entitled matter on the following grounds, to-wit:

I.

This Court has overlooked a fundamental and important right of an alien to have the benefit of counsel from an attorney-at-law from the very beginning of her proceedings, the denial of which constituted a denial of rights under the Fifth and Sixth Amendments to the Constitution of the United States. Treaty obligations between the United States and her native country establish those rights.

II.

This Court has not decided, but should decide, a fundamental question of immigration law of great importance inherent in this case regarding a change of court procedure which, in effect, deprived the alien of her full day in court.

This petitioner's order of deportation is based upon two statements taken from her by an immigration officer, virtually in camera, when she had no attorney, friend or advisor present, and such statements form the *sole* basis for the order for her deportation. Her rights to have the advice and benefit of an attorney-at-law from the very beginning of her interrogation inheres in the ordered concept of liberty and that fundamental fairness of which we boast as those rights in a democratic society that are given to all persons in the United States. They are the very basis of the American concept of fundamental fairness.

> *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158;
> *Lisenba v. California*, 314 U.S. 219, 86 L. Ed. 166;
> *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811.

While these are criminal cases, the result of deportation is as serious, or even more serious, than prosecution and conviction of a crime. Is the Circuit Court decision in this case the first of its kind—to be the rule

regarding aliens, namely—that an immigration officer may take the statements of aliens without the benefit of counsel or without even advising them that they have a right to an attorney and then use the statements thus taken as the sole basis for ejecting them from a country in which they have lived and married an American citizen? Is this what we believe to be an example for the world to see as the concept of American justice extended to all persons in our society?

The transfer of this case and others like it by Congressional fiat deprived the petitioner of due process of law.

At the start of this case the petitioner would have had the right to have presented testimony and evidence and to have a full hearing in the United States District Court. Then by Congressional legislation the case was transferred to the Circuit Court of Appeals. The Circuit Courts are courts of appeal and not of trial, and do not afford opportunities to take testimony, to see witnesses, to observe their demeanor and to reach a factual conclusion based upon examination, cross-examination and observation of witnesses. The statute transferring this case and similar cases to the Court of Appeals, therefore, deprives aliens of a day in court which, in this case, is guaranteed by treaty between the United States and petitioner's native country, Austria.

It is no answer to say that she has had a day in an appellate court, which does not hear witnesses or see them or make factual determinations based upon normal proceedings accorded to an American citizen in declaratory relief actions and in all district court proceedings. Therefore, it has deprived, and does deprive the petitioner of due process and equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States.

We think that this Court, in its closing days, has overlooked these fundamental and important questions inherent and involved in this case and which have not been passed upon heretofore by this Honorable Court in any immigration case that we can find.

We therefore respectfully petition for rehearing and for reversal of the judgment and orders below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I, Morris Lavine, hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay and that it is based upon matters of fundamental importance which have not been, but should be, decided by this Honorable Court, as set out in this petition for rehearing, and is confined to those points.

MORRIS LAVINE.